

## *Proportionate liability to be pleaded like cross-claim*

Rothman J in *H.S.D. Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 has held that to effectively invoke Part 4 of the *Civil Liability Act*, a defence of proportionate liability must be pleaded in at least as detailed a manner as what would be required of any cross claim prior to Part 4 coming into operation.

### **Facts**

The substantive proceedings involved a professional negligence claim by an investor against a financial adviser for losses incurred as a result of the investor relying on the adviser's recommendations. The adviser/defendant sought leave to file a second amended defence to make an allegation of proportionate liability against a number of concurrent wrongdoers.

### **Issue**

The defendant, in seeking to invoke the proportionate liability listed the seven other alleged concurrent wrongdoers. The defendant then went on to allege the seven concurrent wrongdoers owed a duty, which was pleaded in relatively general terms, and that the breach of the duty caused the plaintiff loss and damage.

## **Principles - Proportionate Liability**

Rothman J stated that the *Civil Liability Act* extends:

"protections that would otherwise be available by issuing a cross-claim".

The requirements of properly pleading Part 4 of the *Civil Liability Act* requires the pleading in a manner that discloses the cause of action and damage in at least as detailed a manner as would be required of any initiating process for such a cause of action. The information should include:

- a) *The identity of the wrongdoer*
- b) *The basis for the cause of action- if it be contract, identify the contract; if it be tort, identifying the tort, identifying the duty, its scope and the breach; and*
- c) *The damage- the aspects of causation; the alleged extent and proportion of the damages, and the causal connection with the damage said to be suffered by the plaintiff in the substantive proceedings.*

## Decision

Rothman J found that it was not clear from the pleadings that the duty alleged to be owed by the seven other concurrent wrongdoers was a duty in contract or tort. The need to properly plead the duty was even more important in circumstances where pure economic loss is alleged.

His Honour concluded that:

The plaintiff is not placed... in a position of being provided with sufficient information to determine whether it is appropriate to join, as defendants, the proposed concurrent wrongdoers, or otherwise to deal with the defence of proportionate liability based upon this allegation.

Notwithstanding, his Honour held that to the extent the proportionate liability was available to the defendants they should be given the opportunity to amend their defence.

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